(4)

No. 09A648

IN THE UNITED STATES SUPREME COURT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM, *Respondents*.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY OF THE DISTRICT COURT'S ORDER PERMITTING PUBLIC BROADCAST OF TRIAL PROCEEDINGS

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Petitioners respectfully submit this supplemental brief in support of their application for an immediate stay of the district court's order permitting public broadcast of the proceedings to address developments that came to light yesterday. At the outset of the trial yesterday, the district court offered a further explanation of its plans, and it also filed a number of comments the court received supporting public broadcast (but it did not file any of the comments opposing broadcast). The court also filed a copy of a January 8, 2010, letter from the Honorable Anthony J. Scirica, Chairman of the Executive Committee of the Judicial Conference of the United States and Chief Judge of the United States Court of Appeals for the Third Circuit, and James C. Duff, Secretary of the Judicial Conference of the United States, to the Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit ("Letter of Chief Judge Scirica and Mr. Duff"), and Chief Judge Kozinski's January 10, 2010, letter in response ("Letter of Chief Judge Kozinski").[1]

1. Both the district court and Chief Judge Kozinski stated that they believe the Judicial Conference's policy on this matter is outdated and should be changed. *See* Tr. of Hr'g at 13-14 (Jan. 11, 2010); Letter of Chief Judge Kozinski at 4-5. Whatever the merit of their policy views on this question, the precipitate manner in which the governing rules and procedures have been revised and then applied to permit broadcast of the trial in this case is unlawful and should not be permitted to stand. The district court acknowledged yesterday that "the concerns that the proponents have raised here are concerns that should be considered, need to be considered, and in due course should be given thorough consideration." Tr. of Hr'g at 14 (Jan. 11, 2010). But as Congress recognized in prescribing 28 U.S.C. §§ 332(d)(1) and 2071(b), and as this Court

[1] The transcript of the district court's statement appears as Exhibit 1 to the supplemental letter submitted to the Court by Mr. Olson last night, Chief Judge Scirica and Mr. Duff's letter appears as Exhibit 7, and Chief Judge Kozinski's letter appears as Exhibit 8.

recognized in promulgating FED. R. CIV. P. 83(a)(1), it is imperative that full consideration be given to such concerns *before* the changes are adopted. That is especially so where, as here, the change would lead to a policy that, the Judicial Conference of the United States has repeatedly concluded, poses an unacceptably high risk of denying litigants their right to a fair trial.

2. It appears that the plan for broadcasting the trial proceedings in this case has been revised somewhat over the weekend. In his January 10 letter, Chief Judge Kozinski indicated that the district court has "request[ed] to place a video recording of a non-jury civil trial on the Northern District's website." Letter of Chief Judge Kozinski at 1. Similarly, the district court declared yesterday, "What the Court has contemplated and what the Ninth Circuit pilot project contemplates is a posting on the Northern District of California website. It is not a Google YouTube posting that may be commonly understood." Tr. of Hr'g at 10 (Jan. 11, 2010). These descriptions of the broadcast plan differ from the district court's previous description; before yesterday, it was clear that the district court intended that the trial proceedings would be available on YouTube. *See* Tr. of Hr'g at 4, 6 (Jan. 6, 2010) (CA App. (Petitioners' Exhibit B), Ex. 2) (statement of "IT manager for the District Court" that video of the proceedings would be "uploaded to YouTube"); *id.* at 6, 8-9 (court had "started up a YouTube channel" and provided the publicly available "YouTube address"—"youtube.com/usdccand"—where the video could be viewed); *id.* at 17 (district court statement that "the second step of the process" would be "the transmission of these proceedings on a delayed basis to YouTube, for purposes of posting on the Internet so the proceedings can be made generally available.").

Both Chief Judge Kozinski and the district court sought to draw a distinction between posting the video on the district court's website and other means of public dissemination. But Chief Judge Scirica and Mr. Duff reemphasized, in their letter to Chief Judge Kozinski, that "the

Judicial Conference policy ... does not allow courtroom proceedings in civil and criminal trials in district courts to be broadcast, televised, recorded or photographed *for the purpose of public dissemination*." Letter of Chief Judge Scirica and Mr. Duff (emphasis added). In response, Chief Judge Kozinski asserted that "[t]he Judicial Conference did not—and has not—considered video recording and dissemination by court units. Thus, the request by the Northern District of California to record and distribute video under the careful control of the court—not the broadcast media—involves circumstances far different from those considered by the Judicial Conference so long ago." Letter of Chief Judge Kozinski at 3.

We respectfully submit that there is no meaningful distinction between posting a video recording of a trial on the Internet and disseminating it through other means of mass distribution. The concerns driving the Judicial Conference's policy all arise from the impact that video distribution of trial proceedings to millions of people may have on witnesses, lawyers, and judges. That impact is the same regardless of whether the video is disseminated via television or via the Internet. As Chief Judge Scirica and Mr. Duff emphasized, the object of the Judicial Conference policy is "public dissemination" of a video recording of trial proceedings, whatever the means.

Nor is there any meaningful distinction between posting a video on YouTube and posting a video on the district court's website. The "control" that the district court assertedly would have over the video when it is on its own website is entirely illusory. Once a video is posted on a website—whether YouTube, the district court's, or another—it can easily be altered and disseminated widely by those with modest technical skill. Moreover, the specific web address of the public broadcast will hardly make a difference to a fearful or overeager witness or a grandstanding lawyer; the harm comes from the broadcast itself, not its Internet address. Nor

does the advent of new media technologies diminish the force of the Judicial Conference's carefully considered policy. If anything, by making video manipulation and distribution so easy, new media technologies have amplified the risk of irreparable harm to which the Judicial Conference was so sensitive in the quaint era of television and radio.

3. Chief Judge Kozinski also stated that the district court's "request to place a video recording of a non-jury civil trial on the Northern District's website is not ripe for decision; necessary technical issues have not yet been resolved." Letter of Chief Judge Kozinski at 1. That remark should not be thought to render this stay application premature. Both the trial court and Chief Judge Kozinski have already authorized live broadcast of the trial to courthouses around the country, which apparently was unaffected by the technical issues and would have proceeded yesterday but for this Court's temporary stay. Moreover, nothing in Chief Judge Kozinski's letter suggests that he and the district court will not proceed with the contemplated broadcast of the trial proceedings here as soon as the necessary technical issues have been resolved. Rather, according to the district court, Chief Judge Kozinski "worked very hard over the weekend with the Court's technical staff to resolve those issues." Tr. of Hr'g at 12-13 (Jan. 11, 2010).

CONCLUSION

For the foregoing reasons and the reasons previously stated, the Court should stay the district court's order permitting the proceedings in this case to be broadcast beyond the confines of the Northern District of California courtroom.

January 12, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail:

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